Filed 8/16/10 P. v. Maldonado CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VICTOR FIDEL MALDONADO, Defendant and Appellant.	B216394 (Los Angeles County Super. Ct. No. GA073535)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dorothy L. Shubin, Judge. Affirmed with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Victor Fidel Maldonado appeals from a judgment entered after the jury convicted him of count 1, continuous sexual abuse of X.M. (Pen. Code, § 288.5, subd. (a)),[1] and count 3, lewd act upon a child, X.M. (§ 288, subd. (a)). Pursuant to section 1385, the trial court granted the People's motion to dismiss count 2, continuous sexual abuse (§ 288.5, subd. (a)). The jury found appellant not guilty of count 4, lewd act upon a child, Victor M. (§ 288, subd. (a)), and count 5, lewd act upon a child, Victor M. (§ 288, subd. (a)). The jury found not true the allegation that appellant committed sexual crimes against multiple victims within the meaning of section 667.61, subdivision (b).

The trial court sentenced appellant to state prison for 16 years as follows: count 1, the upper term of 16 years, and count 3, a concurrent term of eight years.

CONTENTIONS

Appellant contends that: (1) the trial court failed to instruct the jury that count 1 was time-barred unless it fell within the tolling provisions of section 803; (2) insufficient evidence supported the jury's finding that X.M.'s allegations of abuse were independently corroborated by Victor M.; (3) insufficient evidence supported appellant's conviction on count 3, lewd act upon a child; (4) section 654 precluded separate punishment for counts 1 and 3 where the convictions arose from a single course of continuous sexual abuse; and (5) the trial court's minute order and abstract of judgment must be corrected to reflect the concurrent sentence on count 3.

The People concede that the minute order and the abstract of judgment must be corrected.

FACTS AND PROCEDURAL BACKGROUND

Appellant was charged in count 1 with violating section 288.5 between November 13, 1990, and December 31, 1994. Appellant was charged in count 3 with violating section 288, subdivision (a) between January 1, 1995, and January 12, 1999.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139), the evidence established the following. X.M. was born in November of 1985, to appellant and M.M. In 1991, when X.M. was six years old, appellant began sexually abusing her while M.M. was at work. Appellant regularly came into X.M.'s bedroom at night and rubbed his penis on her buttocks and vagina over her clothes. He also would position her on top of him. Appellant touched her breasts and vagina while napping with her in his bedroom. X.M. showered every other day, and every time she showered, appellant showered with her, touching her vagina with his fingers and inserting his fingers into her vagina. These touchings continued until she was 11. As she got older, appellant entered the bathroom to look at her body. He continued this behavior until she started high school.

Beginning when she was six, appellant made X.M. play a game he called "Free Willy," during which she placed her mouth on his penis. He told X.M. that Free Willy would come out to play if she "made nice," and would leave if she were not nice. He also said that Free Willy would spit if she made him mad. On one occasion appellant ejaculated. Appellant also made X.M. and her brother Victor M. play family. Victor, born in August of 1984, was one year older than X.M. While Victor M. played in the living room, appellant and X.M. went to appellant's bedroom "because that's what Mommy and Daddy did." He would touch her breasts or vagina. The games occurred every weekend.

In junior high school, X.M. began to understand that appellant's behavior was wrong. The games and touching slowly diminished in frequency when X.M. was in junior high school. When she was 14, X.M. began to avoid appellant and leave the room when he entered. Also, appellant began working for the school district, so he was away from the house during the day and weekends. By the time X.M. was 16 years old, appellant no longer touched her.

When X.M. was 15 years old she started shaking and having difficulty breathing while she and her family were watching a movie involving sexual abuse of children.

M.M. took her to the hospital where tests were performed on her and she was referred to a psychologist. She told the psychologist that appellant had touched her on top of her body on two occasions. She did not reveal the full extent of appellant's conduct because she was embarrassed. X.M. continued to have severe panic attacks at night that prevented her from sleeping. X.M. told M.M. about the sexual abuse. When M.M. confronted appellant, he minimized the conduct, saying it happened a long time ago on a few occasions.

After the psychologist reported appellant's conduct to the Department of Children and Family Services, a social worker interviewed X.M., who told her that appellant only touched her twice on the outside of her clothing. Appellant did not live at the family home at that time. She told the social worker that the abuse no longer occurred and she felt safe at home. She did not want to be placed in a foster home. Appellant was ordered to attend counseling.

In 2004, X.M. learned that appellant had two children with another woman. That same year, appellant moved back into the family home. He often brought the two children over for M.M. to baby-sit. X.M. moved out of the house in 2005. In May 2006, Victor M. told X.M. that appellant had also sexually abused him. X.M. and Victor M. reported the sexual abuse to the police.

Victor M. told the police that appellant had sodomized him and had forced him to orally copulate him. At the preliminary hearing, Victor M. testified that appellant had sodomized him and forced him to orally copulate appellant beginning when he was six years old. He testified that his father forced him to do sexual acts by beating him, and that his father seemed possessed when he did so. He also testified at the preliminary hearing that appellant trained him to orally copulate appellant with carrots and hotdogs, calling it a game. He also reported to the police and testified that his boxers stuck to him with dried blood after he was sodomized. At trial, Victor M. recanted, denying that appellant had sexually abused him. Victor M. was impeached with the statements he made to the police and his testimony at the preliminary hearing.

Monrovia Police Department Detective Robert Manuel testified that he interviewed Victor M. on June 14, 2006. Victor M. told him that appellant had sodomized him, that his father seemed demon-possessed at times, and that his underwear stuck to him a few times because of the dried blood. He also testified that Victor M. fled when the case was set for trial in 2007. Victor M. was apprehended and returned when he attempted to cross the border from Mexico into Texas. He agreed to testify against appellant. Prior to his flight, Victor M. had been consistent about his allegations. During an interview the week before trial, Victor M. recanted his story for the first time.

X.M. testified that after Victor M. testified at the preliminary hearing, he was depressed and upset. She testified that he ran away several times. She acknowledged that he changed his testimony at trial and believed he did so because he was depressed and embarrassed.

DISCUSSION

I. The trial court did not improperly instruct the jury on the statute of limitations

Appellant contends that the trial court erred by failing to instruct the jury that count 1, continuous sexual abuse of X.M. in violation of § 288.5, subdivision (a), was time-barred unless it fell within the tolling provisions of section 803. We disagree.

"[A] trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) "We must consider whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law." (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*Ibid.*)

"Section 803 sets forth exceptions to the general limitations periods. The Legislature amended section 803 effective January 1, 1994, to extend the limitations period for prosecutions of certain sexual offenses. (Stats. 1993, ch. 390, § 1, p. 2224.)

These prosecutions became timely if commenced within one year of the victim's report to the police but after the normal limitations period was expired, the crime involved substantial sexual conduct, and independent, admissible evidence corroborated the victim's allegations." (*People v. Delgado* (2010) 181 Cal.App.4th 839, 849.)[2]

Appellant contends that X.M. reported the abuse to the police on June 13, 2006, but the acts of continuous sexual abuse of X.M. of count 1 occurred between 1990 and 1994. The prosecution was initiated on December 5, 2006, after the expiration of the six-year statute of limitations. The trial court instructed the jury with a modified version of CALJIC No. 4.70 as follows: "This action was commenced on December 5, 2006. You may convict the defendant of any of the crimes charged if you find that: [¶] 1. The action was filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime *described in Penal Code section 288(a).* [¶] 2. The crime occurred more than 6 years before the commencement of the action. [¶] 3. The crime involved substantial sexual conduct. [¶] 4. There is independent evidence that

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2 Section 803, subdivision (f)(1) provides: "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a , 288.5, or 289, or Section 289.5, [FN 1] as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object. [¶] (2) This subdivision applies only if all of the following occur: [¶] (A) The limitation period specified in, Section 800, 801, or 801.1, whichever is later, has expired. [¶] (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual. [¶] (C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation. [¶] (3) No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals."

corroborates the victim's allegation, including but not limited to evidence that the defendant committed a similar sexual offense against a different victim. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation." (Italics added.)

Appellant argues that the instruction does not refer to the section 288.5 violation of count 1, but refers only to the section 288, subdivision (a) violation charged in count 3 as falling within section 803. Thus, he argues, the jury was not instructed as to the statute of limitations issue with respect to count 1. However, our review of the instruction as a whole convinces us that it is not reasonably likely that the instruction caused the jury to misapply the law by excluding count 1 from its determination of whether the People timely commenced the case within the limitation period. First, the introductory sentence to CALJIC No. 4.70 states that "You may convict the defendant *of any of the crimes charged*." (Italics added.) It does not require the jury to consider only certain counts as do the other jury instructions such as CALJIC No. 3.30, which refers only to count 1, or CALJIC No. 3.31, which refers only to counts 3, 4, and 5.

Next, it is true that the instruction requires that the jury must find that the person who filed the charges was the victim of a crime described in section 288, subdivision (a), and not, as appellant points out, section 288.5. But, CALJIC No. 10.42.6 instructs the jury that it must find that defendant committed three acts of section 288, subdivision (a), lewd or lascivious conduct, in order to constitute the crime of continuous sexual abuse. That is, the jury was instructed with CALJIC No. 10.42.6 pursuant to which section 288.5, subdivision (a) defines continuous sexual abuse of a child as a person who "engages in three or more acts of substantial sexual conduct, or three or more acts of lewd or lascivious conduct . . . ." The instruction defined "substantial sexual conduct" as, among other things, "penetration of the vagina or rectum." It then states, "In 2001, X.M. made allegations regarding acts committed against her by the defendant. Those described acts do not constitute allegations of substantial sexual conduct." Accordingly, defendant could only be convicted based on performing three or more lewd or lascivious acts,

defined identically by CALJIC No. 10.42.6 and CALJILC No. 10.41 as "any touching of the body of a child under the age of 14 years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party. To constitute a lewd or lascivious act, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child."

Finally, in closing argument, the prosecutor explained that the limitations issue applied to both counts involving X.M.

Viewing the instructions as a whole, we find that it is not reasonably likely that the trial court's instruction caused the jury to misapply the law.

II. Sufficient evidence supports the jury's finding that independent evidence corroborated X.M.'s allegations of sexual abuse

Appellant contends that his convictions on counts 1 and 3 must be dismissed as time-barred because there was insufficient evidence supporting the jury's finding that X.M.'s allegations of abuse were independently corroborated. We disagree.

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury." (*People v. Ceja*, *supra*, 4 Cal.4th at pp. 1138-1139.)

As previously stated, the tolling provisions of section 803, subdivision (f)(2)(C) require that there be "independent evidence that corroborates the victim's allegation," including but not limited to evidence that the defendant committed a similar sexual offense against a different victim. "If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation." (§ 803, subd. (f)(2)(C).) Evidence of uncharged sexual misconduct

may be used to corroborate a victim's allegation. (*People v. Ruiloba* (2005) 131 Cal.App.4th 674, 683.) "To the extent an uncharged act shows a defendant's *propensity* to commit sexual offenses against a child, that can corroborate *all of the charged offenses* even if it does not *particularly* corroborate any specific offense." (*Ibid.*) Significantly, the corroboration does not have to be sufficient to support a conviction. (*Ibid.*) In determining whether the record shows substantial evidence, we view the evidence in the light most favorable to the jury's findings. (*Id.* at p. 682.)

We conclude that Victor M.'s statements to the police and preliminary hearing testimony sufficiently corroborated X.M.'s allegations. Victor M. testified that appellant had sexually abused him when he was six years old until he was 14 years old, corroborating X.M.'s allegations by the similarities in the offenses and children's ages. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 659 [uncharged sex acts similar to charged acts of molestation sufficient corroborative evidence].) That is, X.M. and Victor M. were siblings in the same household, the sexual abuse included the oral copulation of appellant introduced by games, and the abuse began when both were six years old while M.M. was at work. Moreover, Detective Manuel testified that Victor M. was consistent in his allegations, even after he returned from Mexico, until one week before trial. We are not persuaded by appellant's argument that the evidence of corroboration was insufficient because the jury did not convict him of the crimes against Victor M. As stated, while the jury found the evidence insufficient to convict appellant of the crimes against Victor M. beyond a reasonable doubt, "the corroboration does not have to be sufficient to support a *conviction*." (*People v. Ruiloba, supra,* 131 Cal.App.4th at p. 683.)

Additionally, M.M. corroborated X.M.'s charges by testifying that appellant did not deny the molestation when she confronted him. Instead, he minimized his actions by stating it was a long time ago and that it happened just a couple of times.

We conclude there was sufficient independent evidence of corroboration.

III. Appellant's conviction of count 3 is supported by sufficient evidence

Appellant contends that insufficient evidence supported his conviction of count 3 because X.M.'s generic testimony was insufficient to establish a violation of section 288, subdivision (a). We disagree.

Appellant was charged in count 1 with violating section 288.5 between November 13, 1990, and December 31, 1994. Appellant was charged in count 3 with violating section 288, subdivision (a) between January 1, 1995, and January 12, 1999. He argues that the evidence for count 1 and count 3 was exactly the same. He contends that "the prosecutor merely split the evidence at a random point and alleged two crimes based on the same vague testimony."

Section 288, subdivision (a) provides: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

Section 288.5 provides that a resident child molester who engages in at least three acts of substantial sexual conduct or three or more acts of lewd or lascivious conduct with a child under the age of 14 years is guilty of the offense of continuous sexual abuse of a child.[3]

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[3] Section 288.5 provides: "(a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years. [¶] (b) To convict under this section the trier of fact, if a jury, need

Significantly for purposes of this appeal, "[t]here is nothing in section 288.5 or in [*In re Williamson* (1954) 43 Cal.2d 651] that precludes the charging of a violation of section 288 in combination with a section 288.5 violation so long as the crimes charged involved different time periods." (*People v. Hord* (1993) 15 Cal.App.4th 711, 721.)

"Section 288.5 requires that a minimum of three proscribed acts be committed against the child victim during a time period of not less than three months. It also requires that no other sex offense be charged involving the same victim unless the offense occurred outside the time period charged under section 288.5. Thus, there is no prohibition against charging a section 288.5 offense for a certain time period as long as that time period is at least three months in duration; nor is the prosecution prohibited from charging other sex crimes which occurred outside the charged time period. Charging additional crimes is not unfair. A defendant who committed a crime during an earlier time frame or who continues to perpetrate sexual abuse for a longer period of time than that required by section 288.5 is more culpable than a defendant who perpetrates the continued abuse for a limited time." (*People v. Hord, supra,* 15 Cal.App.4th at p. 720; *People v. Cortes* (1999) 71 Cal.App.4th 62, 75 [prosecutor properly charged defendant with a single count of continuous abuse under section 288.5 for acts occurring from June 1994 to February 16, 1996, in addition to a rape charge for a rape that occurred on February 17, 1996].)

Furthermore, section 288.5, subdivision (c) specifically provides: "No other felony sex offense involving the same victim may be charged in the same proceeding

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unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number. [¶] (c) No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim."

with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." (*People v. Hord, supra*, 15 Cal.App.4th at p. 717.) Thus, appellant's argument that the evidence for counts 1 and 3 was exactly the same fails. The evidence supports the finding that appellant committed lewd and lascivious acts in violation of section 288, subdivision (a) outside the time period alleged for his violation of section 288.5, subdivision (c).

Despite appellant's further argument that the evidence was insufficient because it was generic, we conclude that the evidence was sufficient to support the jury's conviction of appellant for violation of section 288, subdivision (a). Generic testimony from the victim is sufficient to support a conviction where the victim describes the kind of acts committed with sufficient specificity to differentiate between the types of proscribed conduct (e.g., "lewd conduct"), and the number of acts committed (e.g., "'twice a month'"). (*People v. Jones* (1990) 51 Cal.3d 294, 316.) In order to assure that the acts were committed within the applicable limitation period, the victim must be able to describe the general time period in which these acts occurred (e.g., "'the summer before my fourth grade'"). (*Ibid.*) "Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Ibid.*) X.M., who was born in November of 1985, testified that appellant committed lewd or lascivious acts between January 1, 1995, and November 12, 1999. She gave specific details about the acts that appellant committed: rubbing his penis on her buttocks and vagina while she was in bed, touching her breasts and vagina in her bedroom and appellant's bedroom, touching and inserting fingers into her vagina, and forcing her to commit oral copulation. X.M. also described with sufficient specificity the time period and frequency of the acts. She testified they occurred between January 1, 1995, and November 12, 1999, when she was between nine and 13 years old. She testified that appellant regularly came into her bedroom at night to touch her, and that the game playing occurred at least once a day on

every weekend. She testified that he entered her shower every other day. She testified that the touching began when she was six years old and gradually began to slow down when she was in junior high school. But he continued to watch her in the shower until she entered high school.

We conclude that sufficient evidence supports a finding that appellant committed a lewd and lascivious act on X.M. during the time period January 1, 1995, through November 12, 1999, as alleged in count 3.

IV. The trial court properly declined to stay the sentence on count 3

Appellant contends that his concurrent sentence on count 3 should have been stayed under section 654 because the offenses in counts 1 and 3 arose from a single course of continuous sexual abuse. We disagree.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931-932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant may be found to have harbored a single intent if the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, resulting in the defendant's being punished only once. (*Ibid.*) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*) "Under section 654, 'a course of conduct

divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

We conclude that the trial court properly declined to stay the sentence in count 3. The offenses in counts 1 and 3 were separated in time by at least one day. The offenses were temporally separated in such a way as to afford appellant the opportunity to reflect and to renew his or her intent before committing the next one. By no means could the molestations described by X.M., which occurred on a weekly basis, be considered part of a continuous course of conduct. We conclude that the trial court properly declined to stay the sentence in count 3 pursuant to section 654.

V. The minute order and abstract of judgment shall be corrected to reflect the conviction and sentence in count 3

Appellant contends, and the People concede, that the minute order and abstract of judgment must be corrected to reflect the conviction and sentence in count 3.

"[An] oral pronouncement of the court controls over the clerk's minute order." (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 183, 185-188.) The record shows that the minutes and the abstract of judgment do not reflect the trial court's sentence on count 3. At the sentencing hearing, the trial court stated: "On count 3, the court selects the high term of eight years to run concurrent." Therefore, we shall order the trial court to correct the minute order and abstract of judgment.

DISPOSITION

The minute order and abstract of judgment are ordered corrected to reflect that appellant was sentenced to 16 years in state prison as follows: count 1, the upper term of

16 years, and count 3, eight years to be served concurrently with the term in count 1. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST